

IN SENATE OF THE UNITED STATES.

MARCH 1, 1845.

Submitted, and ordered to be printed.

Mr. EVANS made the following

REPORT:

*The Committee on Finance, to whom was referred a communication from the Secretary of the Treasury of the 19th February, transmitting, in compliance with a resolution of the Senate of the 23d December last, statements showing the amount of duties upon foreign merchandise which has been refunded since the last session of Congress, and other information connected therewith, report :*

That they have examined the papers which have been referred to them, and which are quite voluminous, with as much care as their limited time, and the pressure of other business devolving on them, would allow. The brief period of the session which now remains, and the great amount of business still to be acted upon by Congress, forbid the expectation that any legislative measure, which the committee would feel it their duty to recommend, could be enacted into a law at the present session. They nevertheless deem it their duty to express the opinions which they entertain upon some of the matters exhibited by the papers before them, that, if approved by the Senate, they may have such influence upon the future administration of the revenue as may be deemed proper by the head of the Treasury Department.

It appears, then, from the papers which have been transmitted by the Secretary, that a considerable amount of duties, which had been previously paid upon the importation of foreign merchandise, has been refunded from the Treasury since the close of the last session of Congress. A portion of these has been refunded under the direction of the Secretary of the Treasury, and a portion under orders issued from the office of the First Comptroller. Other claims are still pending, and doubtless many more will be hereafter presented; a consideration which calls for a careful consideration of the powers of the department over money once paid into the Treasury, no less than of the merits of each particular claim itself.

The first question to be considered respects the extent of the authority possessed by the Treasury Department, in any or all of its branches, to refund moneys which have been received for duties, and actually paid by the receiving officer into the Treasury. The Constitution of the United States declares that "no money shall be drawn from the Treasury but in consequence of appropriations made by law."

It is undoubtedly competent for the Secretary of the Treasury to decide,

in a case of doubt or controversy, what rate of duty, under existing laws, a given article is subject to; and the collector will be authorized, and it will be his duty, to admit it at that rate. If a greater duty shall have been paid to him, which he has not yet paid into the Treasury, he may refund the excess, under the directions of the Secretary of the Treasury. This violates no provision of the Constitution. The only authority which exists by law, that the committee are aware of, for refunding duties once paid into the Treasury, is contained in the second section of the act of March 3, 1839, making appropriations for the civil and diplomatic expenses of Government for that year. By that section it is provided, that "from and after the passage of this act, all money paid to any collector of the customs" for unascertained duties, or duties paid under protest against the rate charged, shall be paid over to the Treasury, and shall not be held by the collector to await any ascertainment of duties, or the result of any litigation which might arise with a view to establish, by judicial determination, the rate of duty properly chargeable upon the merchandise imported. Having made this provision, the section proceeds in continuation of the subject, and without a full pause, "*but* whenever it shall be shown, to the satisfaction of the Secretary of the Treasury, that in any case of unascertained duties, or duties paid under protest, more money has been paid to the collector, or person acting as such, than the law requires should have been paid, it shall be his duty to draw his warrant upon the Treasurer, in favor of the person or persons entitled to the overpayment, directing the said Treasurer to refund the same out of any money in the Treasury not otherwise appropriated."

This latter clause, though not in the most apt and technical form, may fairly enough be considered as an appropriation by law of whatever sums are necessary to be drawn from the Treasury in the execution of the powers conferred by the preceding clauses upon the Secretary of the Treasury, and payments made in pursuance of it are therefore within the provision of the article of the Constitution before recited. But the whole section must be taken together. It was intended to provide for what was then an existing and a growing evil, but, at the same time, not to withhold from importers, who had paid a larger amount in duties than could be legally chargeable, a speedy mode of restitution. The practice of some of the principal collectors then was, to retain in their own possession all sums which were paid for duties under protest, or where the precise rate of duty was not ascertained at the time of payment—thus withholding large amounts from the Treasury, and often greatly to its detriment. The pretence for this course was, that the collector was personally responsible to the importer for any excess he might have received; and that, as once being paid into the Treasury, it could not be taken out without an appropriation by law, his own security required him to keep in his own hands the means of satisfying any judgment which might be obtained against him. The section of the act of 2d March, 1839, was enacted to remedy this evil. It required all sums thus received by any collector to be paid into the Treasury; and it also gave the power, out of the sums thus paid in, to refund any excess which might have been paid. The language of the section is, that "*from and after the passage of this act,*" the collector should pay over, "*but*" the Secretary should have power to refund, &c. The provision, in both respects, was prospective. It did not require collectors to pay to the Treasury money which had been previously paid under the

enumerated circumstances, nor, in the opinion of the committee, did it give to the Secretary power to refund from the Treasury money which had been paid in on previous importations. It appears, from the papers submitted, that considerable sums have been refunded on importations made prior to the enactment of that section—importations made as early as 1833, and in each succeeding year to 1839. If the section shall be construed to give the power to refund duties paid prior to its enactment, the committee perceive no limitation of time within which it may not be exercised; and any duty paid, since the origin of the Government to this day, might, on proof satisfactory to the department, be now withdrawn from the Treasury. It is satisfactory to perceive, however, that, by a circular addressed to the collectors and naval officers, by the Secretary of the Treasury, on 20th December last, he declines to exercise the power, thereafter, in any case of importation prior to the 30th August, 1842, the date of the existing act imposing duties upon imports. It may be questioned, however, whether the Secretary has not thereby imposed upon himself a greater restriction than is required by existing laws. It will be observed that the power of refunding is possessed by the Secretary only in cases where the duties are not ascertained, or when they are paid under protest against the rate charged. The Supreme Court of the United States has decided, in a case brought before it, that a verbal protest is sufficient to entitle the party to claim relief; and while that construction of the act remains, the Secretary would be justified in acting upon it. The Senate have enacted a law, at the present session, restricting the power to cases of written protest, which, it is hoped, may receive the sanction of the House of Representatives.

By the papers referred to the committee, it appears that a considerable amount has been refunded, which had been paid upon the importation of wines from Portugal, since the passage of the act of 30th August, 1842. That act fixed a rate of duty upon that description of wines, (to wit: Madeira and Port,) different from the rate imposed upon the white and red wines of France, Austria, and some other countries. The Secretary of the Treasury has decided, by a circular dated July 16, 1844, that the act of 1842, which imposed a specific duty on Madeira and Port wines, by name, and a lower rate upon the white and red wines of France and Austria "*not enumerated*," comes in conflict with the treaty between the United States and Portugal, which provides that no other or higher duties shall be imposed on the importation into the United States of America of any article, the growth, produce, or manufacture of the kingdom or possessions of Portugal, than such as are or shall be payable on the like article, being the growth, produce, or manufacture of any other foreign nation."

The committee express no opinion as to whether the act of Congress imposing the duties upon these different kinds of wine be really in conflict with the treaty or not.

By an express proviso to the 5th clause of the 8th section of that act, it is enacted, that "nothing herein contained shall be construed or permitted to operate or interfere with subsisting treaties with foreign nations." That clause relates to the duties upon wines and spirits, and was inserted to meet the case of treaties with Portugal and other nations. The Congress which enacted the law did not undertake to decide the question of conflict, although, from the imposition of the specific duty upon the wines, by name, it would seem that it was not regarded as in contravention of the treaty.

It is undoubtedly competent for the Secretary of the Treasury, *by virtue*

of the *proviso before recited*, to determine whether the rates fixed by the act do violate the provisions of the treaty referred to; and it is known that repeated applications had been made to different persons who filled that office prior to July last, to admit the wines of Portugal at the lower rate, but that no decision had been made in favor of such lower rate, on the ground that the act was in violation of the treaty.

The Secretary having power, and having decided that the *enumerated* wines of Portugal are entitled to be admitted at the same rate of duty as the *non-enumerated* white and red wines of other nations, they are of course entitled to be admitted at that rate until a different construction shall be made. But another question arises; and that is, as to the power of the Secretary to *refund* any duties which had previously been paid into the Treasury upon importations prior to such decision. If they were paid under protest, or where the amount payable was not ascertained, then the power belonged to him, under the second section of the act of 3d March, 1839, already recited. But the committee do not understand from the papers that this requirement was insisted upon. In the circular of July 16, before mentioned, the instructions are in these words:

"In all cases, therefore, of importations of the above-mentioned wines from Portugal and its possessions, made at your port since [the act of] 30th August, 1842, went into operation, and on which higher duties may have been exacted and paid than the rates hereinbefore stated, you are authorized and instructed to issue the usual certificates for refunding to the parties entitled to receive the same the excess of duty paid, over and above said rates, respectively."

The committee are at a loss to find any authority other than that contained in the act of 3d March, 1839, to refund money out of the Treasury overpaid on importations of foreign merchandise; and before that power can be exerted, in any case, all the requirements of that act should be observed.

The papers which are before the committee do not show what amount, or whether any amount, has been refunded on the importation of coffee in Dutch vessels from the Netherlands. That matter has been the subject of a separate report; but the committee have only to add to the observations then made, that, if such duties have been refunded, it does not appear that they were duties paid under protest. The direction of the Secretary to the collector, under date August 5, 1844, is in these words: "Therefore, *such duties as have been so levied* upon coffee so as aforesaid imported in vessels of the Netherlands from their ports in Europe *must be refunded*," &c.

A subsequent part of the same instructions states, that, with a view to a more prompt adjustment of these claims, "instead of refunding the excess to the individual claimant at the Treasury, the collectors of the customs shall be, and are hereby, authorized and instructed, as agents of the Treasury, to pay the same out of the accruing revenue," &c. It is probable, therefore, that these duties have been refunded by the collectors, and, of course, that the amount does not yet appear on the books of the Treasury, and will not until the settlement of the collector's accounts, when a warrant will be issued, agreeably to the requirements of the act of 3d March, 1839, to cover the amounts thus refunded. The amounts, whatever they may be, which have thus been refunded, have substantially been taken from the Treasury, and it will so ultimately appear on the Treasury books.

How far it is competent for the Secretary of the Treasury to determine



whether a law of Congress is in contravention of an existing treaty, the committee have already said, is a grave and important question. They do not propose now to discuss it. If it be, as they believe it to be, to say the least, a very doubtful power in the hands of the Secretary, it would seem to be obviously proper to refrain from the exercise of it until Congress have the opportunity of re-examining the law, and, if deemed necessary, to adapt it to the provisions of treaties. By the provisoes in the fifth clause of the eighth section and in the eleventh section of the act of 1842, it is expressly enacted, that nothing in that clause and in the section named shall be construed or permitted to operate in violation of such treaties. But the same qualification is found in no other part of the act. The Secretary of the Treasury, nevertheless, supposes that it must apply to all parts of it. In his annual report at the commencement of the session, page 16, he says:

"The provision in the eighth and eleventh sections declares that nothing therein shall be construed or permitted to operate so as to interfere with subsisting treaties with foreign nations; *and such provision is necessarily to be applied to other sections, inasmuch as the act of Congress cannot abrogate the obligations of a subsisting treaty.*"

It then adds: "The collectors at the various ports are thus left, in the first instance, to compare the law with the stipulations of the various subsisting treaties, and determine the question as to the rate of duty on the particular article imported, or whether it should be admitted free of duty." The committee do not consider that this power is lodged in the collector. Whatever authority the Secretary himself may have to determine questions of conflict between laws and treaties, the collector has nothing to do but to enforce the plain provisions of the law, under such interpretations and directions as he may receive from the Treasury Department. In the absence of specific instructions in relation to particular articles of importation, the letter of the law is to be his only guide.

By the letter of the Comptroller of the Treasury to the Secretary, dated 18th February, which is among the papers submitted, it appears that, in some cases, judgments have been obtained against collectors for duties paid by importers, which judgments include interest on the amount paid, and also costs of suit, and that these judgments have been satisfied and paid by order of the department. The committee are of opinion, that, by a fair construction of the laws, it is competent for the department to satisfy all such judgments in full; and whenever it shall appear that the collector has obeyed the injunctions of the Secretary in collecting the rate of duties prescribed by him, and has also given seasonable notice of the claim made upon him by suit for the recovery of the excess, and has defended the suit in obedience to the directions of the proper officer of the Treasury, it is his duty to cause the judgment to be satisfied in full. This is due to the party obtaining the judgment, no less than to the officer of the customs. By the act of September 2, 1789, establishing the department, it is made the duty of the Secretary of the Treasury "to superintend the collection of the revenue."

In the performance of this duty, many expenses are incurred, which are necessarily paid out of the accruing revenue, before it is paid into the Treasury.

By the act of 1842, it is made "the duty of all collectors and other officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws."

This was but re-enacting what had always been the duty of the collectors

under previous laws. When, therefore, any collector, in obedience to his instructions, has subjected himself to a judgment which may be enforced upon his private property, he has incurred an expense to the amount of that judgment, which is chargeable to the collection of the revenue. In the proviso to the 5th section of the act of March 3, 1841, making appropriations for the civil and diplomatic expenses of that year, it is enacted, "that the sums limited as compensation to the several officers of the customs named therein, shall be exclusive of the necessary expenses incident to their respective offices, subject to the regulation of the Secretary of the Treasury."

This recognises the principle, that such expenses, than which none can be more imperious than a judgment obtained against the officer, in obedience to the instructions of the Secretary, in execution of the revenue laws, are properly to be paid out of the receipts.

The committee are precluded by other pressing engagements from pursuing their inquiries into other matters communicated by the papers before them. That the revenue laws have received interpretations not in the view of Congress when they were enacted, is quite apparent; and it will be among the early duties of the next Congress to re-examine such interpretations, with a view to greater precision in the language of the acts which are thus brought into question.

The committee, having thus briefly expressed some of the opinions which they have formed upon the matters before them, submit the following resolution :

*Resolved*, That the committee be discharged from the further consideration of the papers referred to them.



